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No. 90-1599

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK DENNIS FELIX,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT, FRANK DENNIS FELIX

STATEMENT

1. On September 15, 1987, respondent was indicted in the Western District of Missouri for attempting to manufacture methamphetamine between August 26, 1987, and August 31, 1987, in violation of 21 U.S.C. 846. Pet. App. 62a-63a. He was convicted and his conviction was affirmed by the Eighth Circuit, 867 F.2d 1068 (1989).

At respondent's trial on the Missouri indictment, the government introduced evidence that on August 26, 1987, respondent met with George Dwinnells, who owned a firm in Tulsa, Oklahoma, that sold scientific equipment

and supplies. Unbeknownst to respondent, Dwinnells was a DEA informant. At trial, Dwinnells testified that respondent sought to purchase chemicals and equipment needed to make methamphetamine. Respondent made a down payment of $7,500 toward the purchase and gave Dwinnells instructions for securing a trailer to transport the merchandise. In later telephone conversations, respondent increased his order for chemicals and equipment and instructed Dwinnells to deliver the items to a Joplin, Missouri, hotel on August 31, 1987. Dwinnells met respondent at the hotel on the designated date. Respondent was arrested after inspecting the chemicals and equipment and hitching his car to the trailer in which Dwinnells had transported them. 867 F.2d at 1070-1071.

Respondent's defense in the Missouri case was that "he never had criminal intent, but had been acting under the mistaken belief that he was working in a covert DEA operation." 867 F.2d at 1074. Accordingly, the government introduced evidence pursuant to Fed. R. Evid. 404(b) that respondent had been involved earlier in 1987 in manufacturing methamphetamine in Oklahoma. See 867 F.2d at 1072-1073. That evidence showed that during the spring of 1987 respondent had brought chemicals and materials for making methamphetamine from Dwinnells and had furnished those supplies to government witness Paul Roach in exchange for lessons on how to manufacture the drug. Roach testified that he and respondent had used the chemicals and equipment to produce methamphetamine in a trailer near Beggs, Oklahoma. Only July 13, 1987, law enforcement agents seized the unattended trailer, but they did not arrest respondent at that time. 867 F.2d at 1070-1071.

The Eighth Circuit found the evidence concerning the methamphetamine laboratory in Oklahoma to be "highly probative of [respondent's] knowledge and intent," and thus admissible under Rule 404(b). 867 F.2d at 1073.

2. On February 16, 1989, respondent was named in eight counts of an 11-count indictment filed in the Eastern District of Oklahoma. Pet. App. 51a-61a. Count 1 charged that he conspired with five other individuals in the Eastern District of Oklahoma and elsewhere between May 1, 1989 and August 31, 1987, to manufacture, possess, and distribute methamphetamine, in violation of 21 U.S.C. 846. Respondent was named in nine of the 18 overt acts that the indictment charged had been committed "[t]o effect the objects of the conspiracy." Pet. App. 53a. Two of the nine overt acts in which respondent was named took place within the time period of the Missouri indictment. Overt act 17 charged that "[o]n August 26, 1987, [respondent], while in Tulsa, Oklahoma, provided money for the purchase of chemicals and equipment necessary in the manufacture of methamphetamine." Pet.App. 55a. Overt act 18 charged that "[o]n August 31, 1987, [respondent], while at a location in Missouri, possessed chemicals and equipment necessary in the manufacture of methamphetamine." *Ibid.*

Respondent was also named in seven substantive counts of the Oklahoma indictment. counts 2 through 5 charged that on or about July 13, 1987, in the Eastern District of Oklahoma, respondent had manufactured methamphetamine (Count 2), possessed methamphetamine with intent to distribute it (Count 3), possessed methamphetamine oil with intent to manufacture

methamphetamine (Count 4), and manufactured phenylacetone, a methamphetamine precursor (Count 5), all in violation of 21 U.S.C. 841 (a)(1). Pet.App. 55a-57a. Count 6 charged that, between June 1, 1987, and July 13, 1987, in the Eastern District of Oklahoma, respondent maintained a place and enclosure for manufacturing methamphetamine, in violation of 21 U.S.C. 856. Pet. App. 57a. Counts 9 and 10 charged that, on or about June 21, 1987 (Count 9) and July 13, 1987 (Count 10), Felix traveled from Texas to the Eastern District of Oklahoma with intent to promote the manufacture of methamphetamine and thereafter attempted to promote that activity, in violation of 18 U.S.C. 1952. Pet. App. 59a-60a.

At trial, the government introduced much of the same evidence that had been introduced in the Missouri trial. Respondent was convicted on all counts and sentenced to serve concurrent 20-year terms of imprisonment on Counts 1 through 6 and five-year terms of imprisonment on Counts 9 and 10. The 20-year sentence imposed for the Oklahoma offenses was set to run consecutively to the sentence imposed for respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

3. A divided panel of the Tenth Circuit reversed respondent's convictions on Counts 1 through 6 of the Oklahoma indictment, and affirmed his convictions on Counts 9 and 10.

a. The court held that the conspiracy offense charged in Count 1 was barred by this Court's decision in *Grady v. Corbin*, 110 S.Ct. 2084 (1990). In *Grady*, the Court held that a subsequent prosecution was barred where

"the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." 110 S.Ct. at 2093. The court of appeals held that for purposes of applying *Grady* to a conspiracy charge, it is the conduct from which the jury is asked to infer a conspiratorial agreement – rather than the agreement itself – that is considered to be the conduct for which the defendant is prosecuted. Pet. App. 13a. The court then summarized the proof presented in the Missouri trial, as recounted by the Eighth Circuit, and concluded that "[a]s to Count 1, the conspiracy charge, the duplication was extensive." *Id.* at 15a.

The court pointed out that in both trials the government proved the whole course of conduct in which respondent learned to make methamphetamine and set up the Oklahoma lab. Furthermore, in both trials the government proved that, after the raid on the Oklahoma lab, respondent purchased chemicals and equipment for setting up a new lab and took delivery of those materials in Joplin, Missouri. The court noted that respondent's conduct in arranging for the purchase of the materials and taking delivery of them, were listed as overt acts in the Oklahoma conspiracy count. Pet. App. 15a-17a. The court also noted that both the Missouri indictment and the Oklahoma conspiracy count focused on the actions of respondent and Roach, and that both the Missouri and Oklahoma charges alleged conduct that took place outside their respective States. Finally, the court found that "the relevant time frames of the two indictments also overlap." *Id.* at 18a. The court stated that "[t]he Missouri prosecution was premised on conduct that occurred from

the spring of 1987 to August 31, 1987," while the Oklahoma conspiracy count charged conduct that occurred from approximately May 1, 1987, to August 31, 1987. *Ibid.* Based on those facts, the court concluded that the Oklahoma conspiracy count charged "the same conduct for which [respondent] was previously convicted in Missouri" and that prosecution on the Oklahoma conspiracy charge was therefore barred by the Double Jeopardy Clause. *Ibid.*

With respect to the substantive offenses charged in Counts 2 through 6, the court noted that in both trials the government proved that respondent had bought chemicals and equipment to manufacture methamphetamine, that he used those chemicals to produce methamphetamine at the Beggs, Oklahoma, trailer, and that the trailer was subsequently seized by law enforcement authorities. Pet. App. 18a-19a. That evidence was used to show intent in the Missouri trial and as direct evidence of the Oklahoma charges. Because the government relied on the same evidence to prove critical elements of the substantive offenses charged in each case, the court of appeals concluded that respondent's convictions on Counts 2 through 6 had to be reversed. *Id.* at 18a-20a.

Finally, the court affirmed respondent's convictions on Counts 9 and 10, charging interstate travel on June 21 and July 13, 1987, to promote the manufacture of methamphetamine. According to the court, the conduct alleged in those counts was not sufficiently related to the conduct proved in the Missouri trial to require those counts to be dismissed under the Double Jeopardy Clause. Pet. App. 20a-21a.

SUMMARY OF ARGUMENT

I.

While Respondent admits that conspiracy, attempt, and substantive crimes have been treated as separate offenses in the context of a single trial, when the double jeopardy protection against successive trial is implicated separate trials using the same conduct to prove material elements is forbidden under *Grady v. Corbin*, cite 110 S.Ct. 2084 (1990); *Brown v. Ohio*, 431 U.S. 161 (1977) and *Illinois v. Vitale*, 447 U.S. 410 (1980). Cases cited by the Government in its Brief on the merits do not support its contentions to the contrary. *Grady v. Corbin*, requires the result reached by the Tenth Circuit.

II.

The Government mistakenly characterizes this case as one involving Rule 404(b) Fed. Rules Cr. P. evidence relying on *Dowling v. United States*, 110 S.Ct. 668 (1990) and *Huddleston v. United States*, 485 U.S. 681 (1988) which are factually distinguishable. The conduct proved in *Dowling* was a single identification in an unrelated robbery. In this case all the conduct related in Missouri were repeated in Oklahoma under an indictment for that same conduct. In *Felix*, the "duplication was extensive". *U.S. v. Felix*, 926 F.2d 1522, 1528 (1991) and fn. 6 p. 1528 (10th Cir.)

III.

U.S. v. Felix, 926 F.2d 1522 (10th Cir. 1991) and *U.S. v. Calderone*, 917 F.2d 717 (2nd Cir. 1990) were both decided after *Grady v. Corbin, supra*. Both were correctly decided

on the conspiracy counts. *Calderone* represents the correct decision regarding the "Facilitation Counts" in the context of separate trial. The Court should establish the clear rule of *Calderone* that where the conspiracy or substantive counts are barred, proof of which is necessary to the facilitation counts, those facilitation counts are also barred. (Counts 9 and 10, *U.S. v. Felix et al.* Pet. App. 59a., 60a.)

ARGUMENT

I.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution assures an individual that he will not be forced to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction. *Abney v. United States*, 431 U.S. 651, 52 L.Ed.2d 651, 97 S.Ct. 2034 (1978). The Double Jeopardy Clause protects an individual against more than being subject to double punishments. It is a guarantee against being twice put to trial for the same offense. See *Abney, supra; United States v. Martin Linen Supply Company*, 430 U.S. 564, 51 L.Ed.2d 642, 97 S.Ct. 1349 (1977); *United States v. Hines*, 689 F.2d 934 (10th Cir. 1982).

In a jury trial, jeopardy attaches when the jury is empaneled and sworn, being an integral part at the Fifth Amendment guarantee against double jeopardy. *United States v. Martin Linen Supply Company, supra; Illinois v. Sommerville*, 410 U.S. 458, 35 L.Ed.2d 425, 93 S.Ct. 1066

(1973). The defendant at that point has a "valued right to have his trial completed by a particular tribunal." *Arizona v. Washington*, 434 U.S. 497, 54 L.Ed.2d 717, 98 S.Ct. 824 at 829 (1978).

> "The bar to retrial following acquittal or conviction ensures that the state does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence."

Ohio v. Johnson, 467 U.S. 493, 81 L.Ed.2d 425, 104 S.Ct. 2536 at 2540 (1984). See *U.S. v. Thompson*, 814 F.2d 1472 (10th Cir. 1987).

When an issue of ultimate fact has once been determined by a valid and final judgment, collateral estoppel dictates that the issue cannot be litigated between the same parties in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed.2d 469, 90 S.Ct. 1189 (1970). As the Supreme Court has explained in *Brown v. Ohio*, 431 U.S. 161, 53 L.Ed.2d 187, 97 S.Ct. 2221 (1977). "It has long been understood that separate statutory crimes need not be identical – either in constituent elements or in actual proof – in order to be the same within the meaning of the constitutional prohibition." *Id.* at 2225. In a case where a single defendant is subjected to successive prosecutions, the Double Jeopardy Clause represents "a constitutional policy of finality for the defendant's benefit." *Brown v. Ohio, supra*, citing *United States v. Jorn*, 400 U.S. 470, 27 L.Ed.2d 543, 91 S.Ct. 547 at 554 (1971). That policy protects the accused from prosecutions involving the relitigation of facts from a prior acquittal, *Ashe v. Swenson, supra*,

and from prosecutions allowing additional punishments after a prior conviction and sentence. *Green v. United States*, 355 U.S. 184, 2 L.Ed.2d 199, 78 S.Ct. 221 at 223 (1957); *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S.Ct. 2072 (1969).

"The right not to be tried more than once and the right not to receive multiple convictions for the same offense are both protected by the Double Jeopardy Clause, but they are conceptually distinct rights." *United States v. Central Liquor Company*, 628 F.2d 1264 at 1266 (10th Cir. 1980). The Supreme Court explains the distinction of applying the Double Jeopardy Clause in cases where factual issues are relitigated in *Brown v. Ohio, supra*.

"The *Blockburger* test, [*Blockburger v. United States*, 283 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932)], is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first. Thus in *Ashe v. Swenson, supra*, where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims". And in *In Re Nielsen*, 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), the Court held that a conviction of a Mormon on a

charge of cohabitating with his two wives over a 2 1/2-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.

"In both cases, strict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe*, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. See *Ebeling v. Morgan*, 237 U.S. 625, 35 S.Ct. 710, 59 L.Ed. 1151 (1915). In *Nielsen*, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the "same" for purposes of protecting the accused from having to " 'run the gauntlet' a second time." *Ashe, supra* at 1195, quoting from *Green v. United States, supra*, at 225.

Id. at 2226.

The Government argues in its Brief on the merits that "Conspiracy and a related substantive crime are not the 'same offense' for purposes of the Double Jeopardy Clause" (pp. 12 through 15). As a general rule, within the context of a single trial, this is the case. However, under the teachings of *Brown v. Ohio, supra*, and *Grady v. Corbin, supra*, where proof of the same conduct proves a material issue in each case, no decision has been reached by the Court. The Government's Brief, p. 14, states: "And it is not unusual for the two charges to be brought in separate

prosecutions, particularly where, as in this case, the conduct pertaining to each offense was based in different jurisdictions." The citations at pages 12 and 13 and in footnote three, page 14 of the government's brief do not support his conclusion, and require some discussion.

Blockburger v. United States, 284 U.S. 299 (1932) holds, in the context of a single trial, that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. Even this case has been converted to analysis of the *statutes* involved to determine if either contains an *element* that the other does not. *Brown v. Ohio, supra.*

Most of the cases cited involve single trials for conspiratorial and substantive conduct. *United States v. Feola*, 420 U.S. 671 (1975) (conspiracy and assault on Federal narcotics officers, single trial); *Callanan v. United States*, 364 U.S. 587 (1961) (single trial, separate and cumulative punishments for obstructing interstate commerce by extortion and conspiracy to do so); *Pinkerton v. United States*, 328 U.S. 640 (1946) (single trial, multiple punishments for conspiracy and substantive offense – primarily significant for abolishing once and for all the concept of merger); *Iannelli v. United States*, 420 U.S. 773 (1985) (Single trial for RICO conspiracy and substantive gambling counts).

Garrett v. United States, 471 U.S. 773 (1985) involves violations of 21 U.S.C. § 848, Continuing Criminal Enterprise, where facts are offered to prove one of three

predicate offenses that must be shown to make out a CCE violation. The *Garrett* case involves a more complicated statutory scheme than is involved in this case, and the Court has accepted for argument the case of *United States v. Gambino*, 920 F.2d 1108 (2d Cir. 1990), U.S. Supreme Court No. 91-31, 49 CrL 3099. However, in *United States v. Russo, et al.*, 906 F.2d 77 (2d Cir. 1990), the government conceded double jeopardy violation under *Grady v. Corbin* under similar facts. "In its letter brief, the government conceded that prosecution of the obstruction of justice charges in the Southern District following acquittal of the RICO conspiracy in the Eastern District was inconsistent with the 'conduct' test announced in *Grady*." *Id.* at 78.

The case of *United States v. Bayer*, 331 U.S. 532 (1947), is inapplicable to the situation of successive trials in the double jeopardy context for two reasons. First, military courts martial are subject only to limited review by civilian courts. See *Carter v. McClaughry*, 183 U.S. 365 (1902), discussed at further length *infra*. Secondly, under its facts, *Bayer* has been overruled, *sub nom*, by *McNally v. United States*, 107 S.Ct. 2875 (1987).

In *United States v. Marden*, 872 F.2d 123 (5th Cir. 1989), the defendant Marden was indicted in Florida on four counts as follows: "[C]onspiring to import in violation of 21 U.S.C. §§ 952 and 963 (Count 1); attempting to import in violation of 18 U.S.C. § 2 and 21 U.S.C. §§ 952 and 963 (Count 2); conspiring to possess with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 3); and possessing illicit drugs on board a vessel within the customs waters of the United States, with intent to distribute, in violation of 21 U.S.C. §§ 955a(c), 19 U.S.C. § 1401(j), and 18 U.S.C. § 2 (Count 4)". *Ibid.* At 124. A later

indictment in Louisiana charged conspiracies under the same statutes for an importation into that state and two substantive counts involving an importation, substantially identical to the Florida indictment. Marden was convicted in Federal Court in Florida on the conspiracy charges (Counts 1 and 3) and acquitted on the substantive counts (Counts 2 and 4). *Ibid.* at 124.

> "Marden then filed a pretrial motion to dismiss the Louisiana indictment on double jeopardy grounds. *The government agreed* to the dismissal of the conspiracy charges (Counts 1 and 3), but opposed the dismissal of the substantive counts (Counts 2 and 4). The Louisiana district court dismissed Counts 1 and 3, but denied Marden's motion to dismiss Counts 2 and 4, finding he had never been put in jeopardy for the substantive counts of the Louisiana indictment. The court stayed Marden's trial on these two counts pending resolution of the issue by this court, which has jurisdiction to review the denial of a motion to dismiss based on double jeopardy grounds under *Abney v. United States*, 431 U.S. 651, 97 S.Ct. 2034, 2040, 52 L.Ed. 651 (1977).
>
> *Ibid.* at 124-125.

The Fifth Circuit decided the case against Marden on a *Blockburger* analysis, citing *United States v. Anderson*, 651 F.2d 375 (5th Cir. 1981), and denied Marden's double jeopardy motion on the substantive counts of attempt and possession in Louisiana. *Marden*, supra, at 126. The history of the case ends with this opinion, and the outcome, whether by jury verdict or guilty plea is unknown to this author.

However, the *Marden* case was decided in April 1989, more than a year before *Grady v. Corbin, supra*, and sheds no light on what conduct was used in Florida to prove the conspiracies.

The remaining cases cited by the Government are *single trial cases involving double punishments*. *United States v. Anderson*, 651 F.2d 375 (5th Cir. 1981) (Conspiracy to import and attempt); *Brinkley v. United States*, 560 F.2d 871 (8th Cir. 1977) cert. denied, 98 S.Ct. 435 (1977) (Conspiracy and attempted bank robbery); *United States v. McQuisten*, 795 F.2d 858 (9th Cir. 1986) (single trial convictions among others for Conspiracy and attempt to manufacture methamphetamines, *all sentences concurrent*). The remaining two cases are discussed at length below.

In *United States v. Touw*, 769 F.2d 571 (9th Cir. 1985) the court laid down its rule on multiple punishments for attempt and conspiracy:

> "Here, appellants engaged in a single act when they attempted to purchase marijuana from DEA agents. The government properly charged them with both conspiracy and attempt, but if convicted on both counts, the court may punish them on only one count." *Id.* at 574.

The issue of separate punishments for the separate offenses of attempt and conspiracy was addressed by the 10th circuit in *United States v. Savaiano*, 843 F.2d .1280 (10th Cir. 1980). In *Savaiano*, the defendants were convicted of conspiracy to manufacture amphatamines and attempt to manufacture amphatamines, and separate sentences for the dual convictions were upheld by the court. The instant case can be distinguished from *Savaiano* in two fundamental areas.

First, the appellants in *Savaiano* were tried and convicted of the offenses in a single trial in Federal Court. *Id.*, at 1280. Appellant Felix was subjected to two separate trials in two separate jurisdictions, the Western District of Missouri and the Eastern District of Oklahoma.

Second, while it relied on the reasoning in *Blockburger v. United States, supra,* to uphold the separate convictions the Tenth circuit noted:

> "We rely on the sound discretion of sentencing judges to ameliorate, in appropriate cases, the potential injustice or harshness of multiple sentences arising from a single course of conduct or transaction. That discretion was exercised in this case when the district court caused the separate sentences to run concurrently."

United States v. Savaiano, supra, at 1293. In the instant case, Appellant Felix was not only placed in jeopardy twice for the offenses from a single transaction, he was twice convicted and sentenced to consecutive prison terms.

Since Felix was tried in two separate trials, and the sentences were made consecutive in the second trial, we are left merely to speculate what the trial judge in Missouri (first trial) or in Oklahoma (second trial) would have done had all offenses been before him at trial.

The Tenth Circuit has acknowledged the problems associated with strict application of the *Blockburger* test in cases involving multiple prosecutions of offenses arising out of a single course of conduct or transaction. In *Tucker v. Makowski,* 883 F.2d 877 (10th Cir. 1989), the petitioner appealed the denial of a writ of habeas corpus challenging his state convictions in successive prosecutions for

offenses arising from the same criminal transaction. *Id.*, at 878. The Tenth Circuit noted:

> On appeal, petitioner relies in part on *Jordan v. Virginia,* 653 F.2d 870, 873 (4th Cir. 1980), to argue that the *Blockburger* test does not apply where successive prosecutions are involved. We disagree with the Fourth circuit to the extent that the court has suggested that the *Blockburger* test does not ordinarily apply to double jeopardy challenges to successive prosecutions. . . .
>
> We do agree, however, that successive prosecutions implicate "the protection against re-trial itself." *Jordan,* 653 F.2d at 873. This component of double jeopardy, "insures that having once 'run the gauntlet' of criminal trial to judgment either of conviction or acquittal, a person shall not be required to run essentially the same gauntlet again." *Id.*, . . . Because this important interest is at stake, the *Blockburger* test's examination of the requisite statutory elements must be made "from the vantage point of the particular case before the court."

Id. at 879.

In the instant case, the appellant has previously been placed in jeopardy, in that the offenses charged against him in the Western District of Missouri arose out of the same transactions and constitute the same elements as the indictment from the Eastern District of Oklahoma, both of which led to a finding of guilty by a jury and a prison sentence by a court.

In order to avoid the strictures placed on the Government by the Double Jeopardy Clause and *Grady v. Corbin,*

supra, the government argues that "In this case, by contrast [to *Grady*], reproving the elements of the Missouri attempt offense would not establish the Oklahoma conspiracy offense or any essential element of that offense." Government's Brief on the Merits p. 20.

> "Although respondent's conduct in connection with the Missouri attempt provided evidence of the nature and extent of the conspiratorial agreement, the agreement was not itself established by the evidence of respondent's Missouri conduct. The jury could have convicted respondent of the conspiracy count even if it disbelieved all the evidence concerning respondent's Missouri conduct, and it could have acquitted him of the conspiracy even if it had found that he committed the crime of attempt in Missouri." United States' Brief on the Merits, p. 21.

Having been deprived of his valuable right to place all the conduct before one trial jury, Felix will never know.

This argument ignores the plain language of the Eighth Circuit opinion stating that:

> "Felix was indicted for knowingly and intentionally attempting to manufacture methamphetamine. 'Where specific intent and guilty knowledge are elements of the crime charged, evidence of related criminal activity *tending to establish those elements* is generally admissible.' *United States v. Gocke*, 507 F.2d 820, 824 (8th Cir. 1974, cert. denied, 420 U.S. 979 (1975) . . . (additional citations omitted). More specifically, we have repeatedly held that evidence of similar prior drug activity is *admissible in drug prosecution cases because a defendant's complicity in other*

> *similar transactions serves to establish intent or motive to commit the offense charged.* (citations omitted) (emphasis supplied). . . . The evidence linking Felix to the Beggs lab supported the Government's case that Felix had the requisite knowledge and intent to make methamphetamine. This evidence showed Felix learning how to cook methamphetamine, developing a relationship with a supplier of methamphetamine-making chemicals and equipment, and ordering explosives for his future lab. In short, *the evidence was relevant to a material issue. United States v. Felix*, 867 F.2d 1068 at 1072 (8th Cir. 1989). (Emphasis supplied).

In the Missouri trial, Felix relied on the defense of entrapment, and the only issue to be decided was whether or not Felix possessed the requisite intent to commit the crime, and appellant was required to admit the physical acts required under the statute charged. *Id.* at 1074. The Government's argument that the court's limiting instruction preventing use by the jury of the Beggs Oklahoma lab evidence to prove physical acts in the Missouri jurisdiction saves the evidence for later prosecution is fatuous. In order to raise an entrapment defense it is necessary to admit the physical acts, and they presented no contested issue for the jury's determination. The *only issue* before the Missouri jury was *intent and knowledge*, and the *only evidence used to prove that material element* was the evidence of the Beggs lab and related transactions subsequently prosecuted in Muskogee, and the subject of this appeal.

The government contends in its brief that:

"The overlap in proof between the two cases does not establish a violation of the Double Jeopardy Clause. Indeed, if *Grady* is interpreted to foreclose prosecution for an offense simply because evidence of the commission of that offense was relevant to a prosecution for a different crime, the double jeopardy rule of *Grady* will have been converted into the 'same evidence' test. In that event, to avoid the bar of double jeopardy the government will have to avoid any reference in one prosecution to acts of misconduct that might ultimately be charged as criminal offenses in a second prosecution. The Court in *Grady* disclaimed any intention to create such a rule, see 110 S.Ct. 2093 & n. 12, and such a rule, if adopted, would fly in the face of almost 100 years of this Court's precedents." Government's brief on the merits p. 21-22.

The cases cited in the Government's brief do not support this proposition. *Gavieres v. United States*, 220 U.S. 338 (1910), where a Philippine citizen was twice convicted for the same conduct in two different courts of the Philippine Islands would not survive the test of *North Carolina v. Pearce* 89 S.Ct. 2072, 2089 (1969), nor *Grady v. Corbin, supra*.

> It is urged that that case is different because there were two different crimes with different punishments provided by statute for each one. That, however, is a matter of semantics. 'It is immaterial to the basic purpose of the constitutional provision against double jeopardy whether the Legislature divides a crime into different degrees carrying different punishments or allows the court or jury to fix different

> punishments for the same crime.' *People v. Henderson*, 60 Cal. 2d 482, 479, 35 Cal. Rptr. 77, 86, 386 P.2d 677, 686 (1963) (Traynor, J.)"
>
> *North Carolina v. Pearce*, supra, 2089 (Concurring opinion).

In *Burton v. United States*, 202 U.S. 344 (1905), a U.S. Senator was convicted of agreeing to receive and receiving compensation for representing the Rialto Grain and Securities Company in violation of Sec. 1782 of the Revised Statutes. The Court stated:

> "The plaintiff in error was indicted in the Circuit Court of the United States for the Eastern District of Missouri for a violation of section 1782, the offense being alleged to have been committed at St. Louis. The accused was found guilty, and on writ of error *the judgment was reversed by this court* and a new trial ordered upon the ground, among others, that according to the facts disclosed in that case the offense charged was not committed in the State of Missouri where the accused was tried *Burton v. United States*, 196 U.S. 283.
>
> Subsequently, the defendant was tried under a new indictment (the present one) charging him with certain violations of section 1782. The new indictment contained eight counts."

Burton, supra, 202 U.S. 344 at 360.

Furthermore, the Court stated:

> "He was then arraigned, tried and found guilty on the first, second, third, sixth, seventh and eighth counts. No judgment or sentence was pronounced on the first second and eighth counts, *because they covered the transaction and*

> *offense mentioned in the sixth count.* And *as the third count covered the transaction and offense embraced by the seventh count, no judgment or sentence was pronounced on it.*
>
> *Id.* at 361 (emphasis supplied).

Burton, therefore, stands for the proposition that retrial after a reversal at the appellate level does not implicate double jeopardy protections, and the quotation cited by the Government concerns a single trial where two distinct offenses derive from the same statute. Burton was punished only for one count.

Carter v. McClaughry, 183 U.S. 365 (1902) is the review of a military court martial, where one trial was had and multiple punishments rendered. "The contention that an officer convicted of crimes punishable in the penitentiary under Articles 60 and 97 cannot be so punished if he be also dismissed, or cannot be dismissed if he be so punished, is too unreasonable to be countenanced." *Ibid.* at 396. In conclusion, the court stated:

> "But we must not be understood by anything we have said as intending in the slightest degree to impair the salutary rule that the sentences of the courts martial, when affirmed by the military tribunal of last resort, *cannot be revised by the civil courts* save only when void because of an absolute want of power, and not merely voidable because of the defective exercise of power possessed. *Ibid.* at 401.

Kepner v. United States, 195 U.S. 100 (1904), cited at fn. 7, page 22 of the Government's Brief on the merits, involves a unique fact situation where the court barred a second trial after acquittal in the Philippine Islands, even

where the Government was given the temporary statutory right to appeal trial acquittals.

> "The court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offense, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well settled sense as declared and settled by the decisions of this court.
>
> "It follows that military order No. 58, as amended by act of the Philippine Commission, No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, was repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offense.
>
> "This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.
>
> Judgment reversed and prisoner discharged."
>
> *Ibid.* 133-134.

In its brief of this proposition, the government ignores *In Re Neilson*, 133 U.S. 176 (1889) (later mentioned in Government's Brief on the Merits, page 19, in connection with another argument). Neilsen's petition for habeas corpus was ordered granted by the Supreme Court where it was shown the petitioner was convicted in

the Territory of Utah first for bigamy and in a separate trial, for adultery, after he had completed his sentence for bigamy. "[W]here, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *Id.* at 188. Cited with approval in *Brown v. Ohio*, 97 S.Ct. 2221, 2227 (1977). The idea that *Grady v. Corbin*, infra, upsets one hundred years of jurisprudence is without basis in fact or precedent.

Grady v. Corbin, 110 S.Ct. 2084 (1990), set forth clearly for the first time the proposition that the Fifth Amendment to the United States Constitution "bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 2093.

In *Grady v. Corbin, supra*, one Thomas Corbin was involved in a traffic crash that caused one death and injured another. He was issued traffic citations for misdemeanor D.W.I. and failure to keep right of the median. Corbin pled guilty in Town Justice Court and was sentenced to probation and a fine. *Id.*, at 2089. Two months after the sentences in the misdemeanor cases, a grand jury indicted Corbin for "reckless manslaughter, second degree vehicular manslaughter, and criminally negligent homicide for causing the death of Brenda Dirago; third degree reckless assault for causing physical injury to David Dirago; and driving while intoxicated." *Id.*, at 2089.

Corbin's attorney sought a Writ of Prohibition which was denied by the New York Appellate Division which was reversed by the New York Court of Appeals.

> "The court [New York Court of Appeals] prohibited prosecution of the driving while intoxicated counts pursuant to New York's statutory double jeopardy provision, N.Y. Crim.Proc.Law § 40.20 (McKinney 1971 and Supp. 1970-1989). The Court further ruled that prosecution of the two vehicular manslaughter counts would violate the Double Jeopardy Clause of the Fifth Amendment pursuant to the *Blockburger* test because as a matter of state law, driving while intoxicated 'is unquestionably a lesser included offense of second degree vehicular manslaughter.' 74 N.Y.2d, at 290 and n.7, 543 N.E.2d at 720, and n.7. Finally, relying on the 'pointed dictum' in this court's opinion in *Vitale* [*Illinois v. Vitale*, 447 U.S. 410 (1980)], the court barred prosecution of the remaining counts because the bill of particulars expressed an intention to 'rely on the prior traffic offenses as the acts necessary to prove the homicide and assault charges.' " *Id.* at 2092.

In affirming the New York Court of Appeals, Mr. Justice Brennan wrote:

> "These cases all recognized that a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials. This case similarly demonstrates the limitations of the *Blockburger* analysis. If *Blockburger* constituted the entire double jeopardy inquiry in the context of successive prosecution, the State could try Corbin in four consecutive trials:

for failure to keep right of the median, for driving while intoxicated, for assault, and for homicide. Tr. of Oral Arg. 17-18. The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. Corbin would be forced either to context each of these trials or to plead guilty to avoid the harassment and expense.

Thus, a subsequent prosecution must do more than merely survive the *Blockburger* test. As we suggested in *Vitale*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding. See *Dowling v. United States*, 493 U.S. ___, 110 S.Ct. 558 (1990). On the other hand, a State cannot avoid the dictates of the Double Jeopardy Clause merely by altering in successive prosecutions the evidence offered to prove the same conduct."

Id. at 2093.

The Government admits, in its Petition for Certiorari, that the identical evidence was used to produce convictions in two separate jury trials in two separate *federal* jurisdictions for the same conduct. Petition for Certiorari, pages 2 through 9 entitled "Statement", and in its Brief on the Merits, page 19: "That is, a second prosecution is not barred simply because the government proves the second offense by relying on the same evidence that it used to prove the first offense."

By a plain reading of the opinions in the two "Felix Trials", it is clear that (1) the conduct presented at both trials is identical, (*United States v. Felix*, 926 F.2d 1522, 1529 (10th Cir. 1991), [citing *United States v. Felix*, 867 F.2d 1068, 1070-71 (8th Cir. 1989)]; (2) no *new evidence* was developed between the trials or presented at the second trial; (3) the *conduct* presented in the first trial to support the *essential element of intent and 'substantial step' requirements for conviction* was used in the second trial to prove *substantive offenses*, indicted in Oklahoma as Counts 1 through 6, *U.S. v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991); (4) the government admitted at trial that the "Possession of chemicals and equipment necessary to the manufacture of methamphetamine, overt acts 17, and 18 in the present indictment, (Oklahoma) (Felix II), was the activity leading to defendant's conviction for attempted manufacture in the Western District of Missouri", and should not be permitted to argue to the contrary in this high Court. *United States v. Felix*, 926 F.2d 1522, 1530 (10th Cir. 1991). The offenses of *conspiracy and attempt* to violate Section 841(a)(1) of Title 21 U.S.C.A., while not identical, and may subject a defendant trial and punishment for both in the context of a single trial, may not be tried in

subsequent trials where they were subject to the proof of the same conduct. *Grady v. Corbin, supra.*

The guarantee of the Fifth Amendment (Double Jeopardy Clause) protects against "a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969), *Brown v. Ohio*, 97 S.Ct. 2221, 2225 (1977).

III.

The Government's Brief on the Merits in this case mistakenly focuses on the dissent by Judge Anderson, *United States v. Felix*, 926 F.2d 1522 (10th Cir. 1991), and on the case of *Dowling v. United States*, 110 S.Ct. 668 (1990), decided before *Grady v. Corbin*, and dealing with Rule 404(b) evidence. In *Dowling*, evidence of an identification in an unrelated robbery was allowed, even though the defendant had been acquitted, where *"the prior acquittal did not determine an ultimate issue in the present case."* *Dowling v. U.S.*, 110 S.Ct. 668, 672 (1990). Furthermore, the *Dowling* opinion states that "[t]he prosecutor then contended that Dowling had not disputed identity, but rather had claimed that a robbery had not taken place because he and Christian allegedly 'merely came to retrieve . . . money from an individual in the house.' " *Id.* at 674. The court concluded that Dowling's first acquittal could have resulted from "any number of possible explanations" *Id.* It is apparent from the decision below in both Felix appeals that that is not the case here.

Felix contested the evidence against him in both cases, and the evidence of the Oklahoma lab and "prior bad acts" was admitted because it was "relevant to *a material issue* and its probative value . . . [was not] . . . substantially outweighed by the danger it presents of unfair prejudice." *U.S. v. Felix*, 867 F.2d 1068, 1972 (8th Cir. 1989). The Eighth Circuit found such conduct "highly probative of knowledge and intent, which were elements of the crime with which he was charged." *Id.* at 1073.

In addition, there is a crucial element in this case and in *Grady v. Corbin*, which is absent from the *Dowling* case. *There is a continuing course of related events* from the spring of 1987 through Felix's arrest in the fall of 1987. Grady was prosecuted for a *related series of events* over a shorter period of time. In *Dowling*, there is nothing to indicate that the conduct offered in both trials was in any way related to an ongoing scheme.

Likewise, reliance on *Huddleston v. United States*, 485 U.S. 681 (1988) is also misplaced. What the Government's brief fails to acknowledge is that whereas Felix was subsequently prosecuted for this same conduct, there is no record that Huddleston was so prosecuted, and *Grady v. Corbin* would mandate the same result in a subsequent trial of Huddleston for the "similar act evidence". Government's Brief on the Merits, page 30.

The case of *United States v. Calderone*, 917 F.2d 717 (2nd Cir. 1990), denigrated in the government's brief on the merits at p. 25, is directly on point in this case, and correctly decided. There, the government carved a smaller conspiracy out of a larger conspiracy for which

the defendant was acquitted. Here, the government charged in Oklahoma a larger conspiracy out of facts proved in Missouri to support the intent requirement and the substantial step requirement of a prosecution for attempt. In *Calderone*, the Second Circuit treats the substantive offenses differently than the Tenth Circuit did in this case. "The 'same conduct' test likewise bars prosecution of the substantive telephone and heroin distribution counts. Although Calderone and Catalano were not charged with these specific crimes in *Adamita*, they were nonetheless prosecuted for the *conduct* that supports these offenses. And under *Grady*, they may not again be prosecuted for this conduct, even though the charges are brought under different criminal statutes." *Calderone, supra*, at 722. The Tenth Circuit declined to adopt the rule in *Calderone* concerning the two travel counts (9 and 10) of the Oklahoma indictment. *U.S. v. Felix*, 926 F.2d 1522, 1531 (10th Cir. 1991) stating:

> "At first glance, the remaining counts: 9 and 10 (interstate travel to promote manufacturing) seem akin to the telephone counts also barred in *Calderone*. Arguably, they also 'allege[ ] as an element the facilitation of the conspiracy charged in count one' 917 F.2d at 726 (Newman, J., concurring). We are not, however, inclined to go so far on the record before this Court.
>
> *Ibid.* footnote 8, p. 1531.
>
> "Where successive prosecutions are at stake, the guarantee (of the Fifth Amendment Double Jeopardy Clause) serves 'a constitutional policy of finality for the defendant's benefit.' *United States v. Jorn*, 400 U.S. 570, 479, 91 S.Ct. 547, 554, 27 L.Ed.2d 543 (1971) (plurality opinion). That policy protects the accused from attempts to relitigate the facts underlying a prior acquittal, see *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); cf. *United States v. Martin Linen Supply Co.*, 430 U.S. 5674, 97 S.Ct. 1347, 51 L.Ed.2d 642 (1977), and from attempts after a prior conviction and sentence, see *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957); cf. *North Carolina v. Pearce, supra*."
>
> *Brown v. Ohio*. 97 S.Ct. 2221, 2225 (1977).

The Government has the ability to draft indictments in any manner they chose. What *Grady v. Corbin* teaches is that there are limitations on that power. The government could just as easily have tried the conspiracy in Missouri during the first trial, since elements of the conspiracy occurred in that venue. Fed. R. Crim. Proc. 8(a).

Respondent contends that *Grady v. Corbin, supra*, mandates that this court reverse the trial court's ruling on Appellant's Motion to Dismiss on Grounds of Double Jeopardy. Where, as here, the government used the identical witnesses, the identical physical evidence and convicted on charges for which the respondent had previously been convicted. See *United States v. Felix*, 867 F.2d 1068 (8th Cir. 1989). If the Oklahoma and Missouri cases had been tried in reverse order, and Felix had been tried and sentenced in Oklahoma, there is no doubt that the Missouri trial would have been barred by *Grady v. Corbin, supra*. Where as here, the government chooses to proceed on the small fragment of the larger course of conduct, the same outcome must result. We believe the correct decision was reached in the Second Circuit case and urge that result in this case under the inherent power

of the Court to correct plain error not among the questions presented but evident from the record. Supreme Court Rule 24.1(a).

> "This conclusion merely restates what has been this Court's understanding of the Double Jeopardy clause at least since *In Re Neilson* was decided in 1889. In that case the Court endorsed the rule that
>
> > 'where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' 131 U.S., at 188, 9 S.Ct., at 676.
> >
> > Although in this formulation the conviction of the greater precedes the conviction of the lesser, the opinion makes it clear that the sequence is immaterial." *Brown v. Ohio*, 97 S.Ct. 2221, 2227 (1977).

While *Brown v. Ohio* dealt with joy riding and auto theft as lesser and greater included offenses for the purposes of double jeopardy, that case could have been decided just as *Grady v. Corbin* where joyriding acts would be used to prove the unlawful possession element of the theft case.

> "An exception may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence. (citations omitted) *Brown v. Ohio*, 97 S.Ct. 2221, footnote 7 at p. 2227 (1977).

No such exception exists in this case, as it is clear that the Government merely presented the same evidence at the Oklahoma trial and the Missouri trial. *U.S. v. Felix*, 926 F.2d 1522, 1529-1531 (10th Cir. 1991).

Appellee agrees with Mr. Justice Scalia's comments in his dissenting opinion in *Grady v. Corbin* that "its [the decisions] practical effect, whenever it applies, will come down to a requirement that where the charges arise from " 'a single criminal act, occurrence, episode, or transaction,' " they "must be tried in a single proceeding." (citation omitted) *Id.* at 2102. Mr. Justice Brennan, the author of the *Grady* opinion, long strove for this rule in many dissenting opinions. See *Thompson v. Oklahoma*, 429 U.S. 1053, 97 S.Ct. 768, 50 L.Ed. 2d 770 (Dissenting from denial of certiorari) (1977). Without such a rule,

> "The State could improve its presentation of proof with each trial, assessing which witnesses gave the most persuasive testimony, which documents had the greatest impact, which opening and closing arguments most persuaded the jurors. Corbin would be forced either to contest each of these trials or to plead guilty to avoid the harassment and expense." *Grady v. Corbin*, 110 S.Ct. 2084, at 2093 (1990).

Only such a rule of law can avoid the evils forbidden by the Double Jeopardy clause of the Fifth Amendment and restore the respect of the bench and bar for the rule of law.

CONCLUSION

The Double Jeopardy Clause of the Fifth Amendment prohibits the successive prosecutions suffered by Appellee Felix. The decision of the Tenth Circuit should be reformed to reverse Appellee's convictions on Counts 9 and 10 of the Oklahoma conviction, and as reformed, should be affirmed.

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